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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-696

NORA LEWIS, *et al.*,

Petitioners,

against

PHILIP MORRIS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT PHILIP MORRIS INCORPORATED IN OPPOSITION

EDWARD F. BUTLER
MYRON D. COHEN
DAVID R. DAVIES
CONBOY, HEWITT, O'BRIEN & BOARDMAN
20 Exchange Place
New York, New York 10005

LEWIS T. BOOKER
VIRGINIA W. POWELL
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212

Counsel for Respondent
Philip Morris Incorporated

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BRIEF FOR RESPONDENT PHILIP MORRIS INCORPORATED IN OPPOSITION

Opinions Below

The citations to the opinions and orders of the District Court and of the Court of Appeals are stated in the petition. We respectfully suggest that the reported opinion of the Court of Appeals (577 F.2d 1135) be consulted rather than the text as reproduced in petitioners' appendix. There are numerous errors and omissions in the latter.

Questions Presented

The "Questions Presented" as stated in the petition are not in fact presented on this record. As regards petitioners' Question No. 1, the Court of Appeals held only that the District Court could not vacate an interlocutory order from which an appeal had properly been taken and thereby divest the appellate court of jurisdiction. There was no issue of the jurisdiction of the District Court to proceed with any other facet of the case or to modify the order on appeal in ways which would not moot appellate jurisdiction. With respect to petitioners' Question No. 2, neither the District Court nor the Court of Appeals found that there was an unrebutted *prima facie* case of discrimination.

Reformulated to correctly reflect the record, the "Questions Presented" would read as follows:

1. Can a district court divest a court of appeals of jurisdiction to review an interlocutory order under 28 U.S.C. §1292(a)(1) by vacating the order while the appeal is pending?

2. Did the Court of Appeals err in holding that:

(a) Employer liability under Title VII may not be based solely on the existence of a racial imbalance among the Company's stemmery employees [Sec. 703(j)] when the District Court refused to find that the imbalance was caused by purposeful discrimination. [577 F.2d at 1141]

(b) Failure of the Company to inform black applicants for stemmery jobs of positions available in

other departments and that applicants for these positions would be treated without discrimination is not a violation of Title VII when the Company treated all applicants, black and white, the same. [*ibidem* p. 1143]

(c) It is impermissible to base recovery on the subjective belief of class members "that their race substantially limits their initial employment to the stemmery". [*idem.*]

(d) The finding of the District Court that a substantial number of black applicants for employment by the Company believed that their most likely opportunity for employment would be in the stemmery is clearly erroneous. [*idem.*]

Statutory Provisions Involved

Section 703(j) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2(j)) provides:

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percent-

> age of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Rule 62(c) of the Federal Rules of Civil Procedure provides in part as follows:

> "(c) *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Statement of the Case

This is a class action seeking injunctive relief and damages for alleged racial and sexual discrimination in employment in violation of Title VII of the Civil Rights Act of 1964.

The basic facts and the gravamen of the plaintiffs' complaint are succinctly set forth in the opinion of the Court of Appeals. 577 F.2d at 1137. In summary, the plaintiffs' principal claim is that the Company and the Unions purposely assigned blacks employed at the Company's cigarette manufacturing plant in Richmond, Virginia to the stemmery, which was the most unfavorable department in the Company's operation. There are four departments at the Company's plant, three of which have permanent jobs, while at the remaining department the work is seasonal. The most attractive and skilled jobs, providing the best pay

and the brightest opportunities for advancement, are in the fabrication department where cigarettes are actually manufactured. Employees in fabrication are 41.1% black. The prefabrication department, second ranked in pay and desirability and which involves largely unskilled and heavy labor, is where the bulk tobacco is processed into cut filler for use in the manufacture of cigarettes. Its employees are 85.2% black. WSR, the warehouse department, third ranked in pay and which also involves heavy labor, largely unskilled, has 27.8% black employees. All of these three departments have permanent, as opposed to seasonal, jobs. The fourth department is the stemmery. It is the lowest paying department, almost wholly unskilled and employment is seasonal rather than permanent, and it has 95.4% black employees.

On July 7, 1976, after trial on the issues of liability, the District Court filed its opinion (and entered a judgment order) holding that defendants had violated Title VII and directing further proceedings to determine the injunctive and monetary relief to be awarded. The District Judge's theory was that the respondent had an obligation to take affirmative action to redress the racial imbalance in the stemmery, even though this racial imbalance had not been created by purposeful discrimination against blacks.

The District Court's order of July 7, 1976 was not appealable because it adjudicated liability only without awarding relief. *Liberty Mutual* v. *Wetzel,* 424 U.S. 737 (1976). On September 2, 1976, the District Court entered a further interlocutory order adopting guidelines for determining the relief. This order was appealable under §1292(a)(1), 28 U.S.C. because it mandated immediate action by the Com-

pany, as the Court of Appeals found (577 F.2d at 1139), and hence was an interlocutory order "granting * * * injunctions." Furthermore, appeal from the interlocutory order presented opportunity for a definitive review of the basic underlying liability issues.[1] Accordingly, on September 29, 1976 the defendants appealed. They also moved in the District Court for a stay pending an appeal as expressly sanctioned by §62(c) of the Federal Rules of Civil Procedure. On October 12, 1976, an order was entered granting the stay.

During a hearing on November 3, the District Judge declared that he had had "second thoughts" about the order of September 2, and had considered setting it aside, but reflected, "I don't know as I ought to touch it if it's a matter before the Fourth Circuit" (J.A. 188).[2] At the conclusion of the hearing, the Court noted (J.A. 196):

> "I'm not going to enter any orders, except consider the motion for interim attorneys' fees, while the case is pending in the Fourth Circuit, because I just don't think I should, except a stay, to hold everything, if that's what I have to do."

On November 15, 1976, the Court entered an order awarding petitioners' counsel an interim award of attorneys' fees in the sum of $50,000. Two days later, on November 17, 1976, the Court, *sua sponte,* entered an order purporting to vacate its order of September 2.

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1. *Semmes Motors Inc.* v. *Ford Motor Co.,* 429 F.2d 1197, 1201 (2nd Cir. 1970). The interests of judicial economy were manifestly best served by this procedure. Reversal on the issue of liability by the Court of Appeals avoided the prolonged proceedings in the District Court which would have been required to determine the monetary relief to be awarded each of the more than 3,000 class members.

2. References are to Joint Appendix in the Court of Appeals.

The Court of Appeals held that the purported vacation of the order appealed from had not divested it of appellate jurisdiction. Proceeding to the merits, it reversed, dismissed as to the issue of racial discrimination and remanded for further proceedings as to the issue of sex discrimination. The key holdings of the Court of Appeals are set forth under "Questions Presented", No. 2, *supra* pp. 2-3.

On July 26, 1978, the motion of petitioners for a rehearing *en banc* was denied.

Reasons for Denying the Writ

I

The holding below that appellate jurisdiction was not divested by the District Court's vacation of the interlocutory order does not present a question warranting review by this Court.

The decision of the Court of Appeals that its jurisdiction was not divested by the purported vacation of the order on appeal is in accord with the decisions of this Court, does not conflict with any decision of another Court of Appeals upon the same matter nor does it concern an important question of federal law which has not been but should be settled by this Court. The correctness of this ruling seems self-evident. Indeed, we are aware of no decision *in any court,* holding that the appellate jurisdiction granted by 28 U.S.C. §1292(a)(1) can be frustrated by the vacation of the interlocutory order while the appeal is pending. The spectre of conflict, confusion and uncertainty on this issue among the federal courts painted by petitioners is a mirage.

An interlocutory appeal from an order granting or denying an injunction bars a district court from taking proceedings which would impair the jurisdiction of the appellate court to review the order. *Fernow* v. *Liberty Royalties Corp.*, 146 F.2d 396 (10th Cir. 1944); *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F.2d 623 (2nd Cir. 1962). Appellate review of an interlocutory order thus acts as a constraint upon a district court's jurisdiction. Consistent with that constraint, Rule 62(c), Federal Rules of Civil Procedure, invests a district court with power to make orders necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment but *not* with power to vacate the very order on appeal. Rule 62(c), entirely overlooked by petitioners, provides in relevant part that:

> "... [the district court] in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Petitioners contend[3] that decisions of the Sixth, Seventh, Eighth, District of Columbia Circuits and certain Second Circuit panels, together with certain District Court opinions[4] support a view that the jurisdiction of a district court is not affected during the pendency of an interlocutory appeal. Close analysis of these decisions, however, reveals that in each instance the District Court acted to enter an

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3. Petition, pp. 7-9.

4. The citations to the opinions referred to by petitioners are set forth in footnotes nos. 4, 5, 6, 7, 12 and 15 to the petition, pp. 7-9.

order authorized by Rule 62(c)[5] or to entertain proceedings to preserve the status quo[6] or to continue with aspects of the action which did not impinge upon the jurisdiction of the appellate court.[7] The power of a district court to maintain the status quo during the pendency of an interlocutory appeal and to proceed with aspects of the action unaffected by the appeal has also been recognized by the Ninth[8] and Fifth[9] Circuits. Even the Tenth Circuit which petitioners

5. *Chicago Housing Tenants Organization* v. *Chicago Housing Authority*, 512 F.2d 19 (7th Cir. 1975); *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Ferguson* v. *Tabah*, 288 F.2d 665 (2d Cir. 1961); *Macon* v. *Bailar*, 428 F.Supp. 182 (E.D.Va. 1977); *United States* v. *City of Chicago*, 411 F.Supp. 218 (N.D.Ill. 1976) *aff'd* 549 F.2d 415 (7th Cir. 1977).

6. *United States* v. *Board of School Commissioners of Indianapolis*, 503 F.2d 68 (7th Cir. 1974); *United States* v. *Onan*, 190 F.2d 1 (8th Cir. 1951); *Carpenter Brothers, Inc.* v. *Duval Sales Corp.*, 440 F.Supp. 1150 (E.D.Wis. 1977).

7. *Jago* v. *United States District Court*, 570 F.2d 618 (6th Cir. 1978); *Foote* v. *Parsons Non-Skid Co.*, 196 F. 951 (6th Cir. 1912); *United States* v. *City of Chicago*, 534 F.2d 708 (7th Cir. 1976); *Chicago Housing Tenants Organization* v. *Chicago Housing Authority, supra*, n.5; *Dempsey* v. *Guaranty Trust Co.*, 131 F.2d 103 (7th Cir. 1942); *Janousek* v. *Doyle*, 313 F.2d 916 (8th Cir. 1963); *Western Electric Co.* v. *Cinema Supplies, Inc.*, 80 F.2d 111 (8th Cir. 1935); *Society for Animal Rights, Inc.* v. *Schlesinger*, 512 F.2d 915 (D.C. Cir. 1975); *Human Resources Management* v. *Weaver*, 442 F.Supp. 241 (D.D.C. 1978); *United States* v. *City of Chicago, supra*, n.5; *A.O. Smith Corp.* v. *F.T.C.*, 396 F.Supp. 1125 (D.Del. 1975); *District 2, Marine Engineers* v. *Falcon Carriers*, 374 F.Supp. 1342 (S.D.N.Y. 1974); *SCRAP* v. *United States*, 353 F.Supp. 317 (D.D.C. 1973) *rev'd on other grounds* 412 U.S. 669 (1973); *L.A. Concrete Pumping* v. *Majich*, 18 Fed. Rules Serv. 2d 45 (C.D.Cal. 1973); *O'Brien* v. *Azco Corp.*, 309 F.Supp. 703 (S.D.N.Y. 1969).

8. *Hoffman, etc.* v. *Beer Drivers & Salesmen's etc.*, 536 F.2d 1268 (9th Cir. 1976); *Phelan* v. *Taitano*, 233 F.2d 117 (9th Cir. 1956); *DePinto* v. *Provident Security Life Insurance Co.*, 374 F.2d 50 (9th Cir. 1967).

9. *Plaquemines Parish Commission Council* v. *United States*, 416 F.2d 952 (5th Cir. 1969); *Hamer* v. *Campbell*, 358 F.2d 215 (5th Cir. 1966); *Nalco Chemical Co.* v. *Hall*, 347 F.2d 90 (5th Cir. 1965); *United States* v. *Lynd*, 321 F.2d 26 (5th Cir. 1963).

contend denies a district court any jurisdiction has expressly recognized that the district court continues to have jurisdiction save as to issues raised by the interlocutory order on appeal. *Fernow* v. *Liberty Royalties Corp.*,[10] 146 F.2d 396 (10th Cir. 1944):

> "The order of [the lower court] was an interlocutory order. The appeal therefrom did not transfer jurisdiction over the entire bankruptcy proceedings to the appellate court. It did not preclude further proceedings in the court below which would not interfere with the jurisdiction of this court in [the appeal] or impinge upon any orders it might make therein. . . ." 146 F.2d 306, 397-398

In *Janousek* v. *Doyle*, 313 F. 2d 916 (8th Cir. 1963), the Eighth Circuit made a painstaking analysis of the applicable rules and guiding precedent to derive the general rule that an appeal from an interlocutory order granting or denying an injunction:

> ". . . does not ipso facto divest the district court of jurisdiction to proceed with the cause with respect to *any matter not involved in the appeal,* or operate to automatically stay *other proceedings* in the cause pending the appeal." 313 F.2d 916, 920. (Emphasis supplied)

The corollary of the general rule stated in *Janousek, supra,* requires that a district court guard and preserve the

10. The other Tenth Circuit decisions cited by petitioners, *Petuskey* v. *Rampton*, 431 F.2d 378 (10th Cir. 1970) and *Aune* v. *Reynders*, 344 F.2d 835 (10th Cir. 1965) involved attempts by the lower court to entertain further proceedings pursuant to Rule 60, Federal Rules of Civil Procedure, during the pendency of an appeal from a final judgment. Both cases reaffirm the time honored rule that appeals which are not interlocutory do serve to divest a district court of jurisdiction.

jurisdiction of the appellate court by declining to take action in respect of the order appealed from, save to preserve the status quo or as expressly authorized by Rule 62 (c). In the instant case, the District Court ignored that constraint by purporting to vacate its own order following respondent's interlocutory appeal.

> "Of course, the Trial Court could not, during the pendency of the appeal, take action with respect to the order then under review which would hinder or frustrate determination by the Court of Appeals." *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1003 (5th Cir. 1969).[11]

The Circuit Court properly found that the District Court lacked jurisdiction to vacate the Order once it has become the subject of appellate review. Moreover, the opinion of the Circuit Court is entirely consistent with this Court's opinions in both *Ex parte National Enameling Co.*, 201 U.S. 156 (1906), and *Standard Oil Company* v. *United States*, 429 U.S. 17 (1976).

The issues in *Ex parte National Enameling Co., supra*, arose from a petition by the plaintiff below for a writ of mandamus requiring the Court of Appeals to take jurisdiction of its cross-appeal from a dismissal of certain claims for patent infringement. The writ was denied upon the authority of Section 7 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826, which per-

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11 In accord: *Zimmer* v. *McKeithen*, 467 F.2d 1381 (5th Cir. 1972); *rev'd* 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish* v. *Marshall*, 424 U.S. 636 (1976); *Turner* v. *HMH Publishing Co.*, 328 F.2d 136 (5th Cir. 1964); *United States* v. *Articles of Food and Drug*, 444 F.Supp. 266 (E.D. Wisc. 1978); *E.E.O.C.* v. *Locals 14 and 15, I.U.O.E.*, 438 F.Supp. 876 (S.D.N.Y. 1977).

mitted only a defendant to obtain immediate relief from an injunction. No issue as to the continuing jurisdiction of the District Court arose nor was briefed or argued before this Court. Reference to that issue in the opinion was made solely because the statutory provision, Section 7, contained a proviso that:

> ". . . the proceedings *in other respects* in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal. . ." (Emphasis supplied)

Though it was not necessary for a resolution of the issues before it, the Court expressly approved the plain meaning of the proviso, permitting the District Court, in its discretion, to proceed with aspects of the case unaffected by the appeal. See also: *Miller* v. *United States,* 114 F.2d 267 (7th Cir. 1940), *cert. den.* 313 U.S. 591 (1940).

In *Standard Oil Company* v. *United States,* 429 U.S. 17 (1976), this Court merely found that the District Court had the power under Rule 60(b) to enter a judgment in conflict with the mandate of the appellate court where subsequent events and changed circumstances had rendered the mandated judgment inequitable. The District Court did not act to interfere with or impinge upon the jurisdiction of the appellate court, but rather exercised its discretionary power in equity to adapt its findings to changed conditions. *Cf., United States* v. *Swift & Co.,* 286 U.S. 106 (1932).

The decision of the Court of Appeals in this case avoided months of unnecessary and costly litigation in the District Court. The class represented by the plaintiff comprises more than 3,000 individuals each of whom would have been

entitled to a hearing in the back pay proceedings. Absent the respondents' appeal from the order of September 2, 1976, those hearings would have proceeded upon a finding of liability which was clearly erroneous. However, the Court of Appeals properly found that judicial economy dictated a full review of the liability issue upon a review of the September 2, 1976 Order. By undertaking this review, the Court avoided the futility of dismissing the appeal only to have the same issues return on appeal from final judgment. *Cf., Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), *cert. den. sub nom. Local 741, etc.* v. *Myers*, 434 U.S. 801 (1977); *Illinois Migrant Council* v. *Pilliod*, 540 F.2d 1062 (7th Cir. 1976); *Barrett* v. *Smith*, 530 F.2d 829 (9th Cir. 1975), *cert. den.* 425 U.S. 977 (1976).

II

The decision of the Court of Appeals reversing and dismissing the claims of racial discrimination is in accord with the controlling decisions of this Court and presents no question warranting review by this Court.

The plaintiffs' theory of racial discrimination is that the Company deliberately "assigned" black applicants for employment to low paying seasonal jobs in the stemmery because they were black, in an attempt to preserve "historical" patterns of discrimination. (Pet. 32a, 59a). This claim of purposeful discrimination is a "disparate treatment" claim within the dichotomy of *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). As such, it can only be supported by an ultimate finding of a discriminating motive. *Idem.* Such a finding, however, was expressly disclaimed by the District Court in this case. (Pet. 32a).

In support of their theory, plaintiffs pointed to the statistics showing the high percentage of blacks hired in

the stemmery relative to whites. 51% of all black hourly employees hired in the ten year period ended December 31, 1974 were hired for seasonal work in the stemmery as contrasted with 11.5% of all whites hired during the same period of time. Based on these statistics, the District Court found that plaintiffs had established a *prima facie* case. (Pet. 21a).

The Company denied that the racial imbalance reflected in these statistics was intentionally structured to preserve the historical pattern of segregation which had prevailed prior to the enactment of Title VII. Rather, it claimed, the racial imbalance had come about because blacks were, on the whole, far more willing to accept seasonal employment than whites. In support of its position, the Company showed that hiring for permanent and seasonal jobs was separate subsequent to 1970; that applicants were solicited for seasonal employment separately; that the overwhelming number of applicants for seasonal jobs were black; that very few whites applied for seasonal work; that hiring for seasonal work was proportional to the racial mix of applicants for seasonal jobs; and that among whites hired for seasonal work the attrition rate was significantly higher than that of blacks. (J.A. 624; Pet. 25a, 26a). That, contrary to petitioners' contention below, the Company was not engaged in an attempt to preserve the pre-Act "all white" character of its fabrication and WSR departments is evident from the fact that blacks constituted 32% of all those hired for permanent jobs in those two departments in the ten year period ended December 31, 1974; and that as of the end of that period blacks constituted 41% of the work force in the fabrication department and 28% of that in WSR, as contrasted with a black representation of 24%

in the Richmond SMSA. (J.A. 108, 620, 624). In addition, the Company showed that the compensation of blacks was equal to that of whites of comparable seniority (J.A. 636).

Upon weighing the evidence as a whole, the District Court refused to find that "excessive assignment of blacks to the Stemmery was purposefully undertaken by the Company to covertly continue its historical system of segregated departments." (Pet. 32a). It is clear, as the Court of Appeals pointed out (577 F.2d at 1142), that the District Court did not base its finding of liability on a *prima facie* statistical case but rather found, on the record as a whole, that the statistical case did not support the conclusion of purposeful discrimination. The assertion in the petition (p. 2) that "both courts below found there was an unrebutted *prima facie* case of discrimination" is simply untrue. Since no finding of purposeful discrimination was warranted, the claim of racial discrimination was properly dismissed. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). See *Furnco Construction Company* v. *Waters*, —— U.S. ——, 98 S. Ct. 2943 (1978).

The theory upon which the District Court fashioned liability was that Title VII imposed a duty on the Company to take affirmative action to inform black applicants for stemmery employment of permanent job opportunities, and reassure them that they would not be discriminated against if they applied for permanent employment. In holding that Title VII imposed no such duty on the Company, the Court of Appeals correctly applied the mandate of that statute and the controlling decisions of this Court.

It is noteworthy that the petition for certiorari does not even attempt to argue that the District Court's theory of liability was correct. Rather it claims that the Court of Appeals "should either have remanded the case for application of the proper standards, *Hazelwood School District* v. *United States,* 433 U.S. 299, 309, 312 (1977), or analyzed the evidence itself in the light of those standards. *Furnco Construction Corp.* v. *Waters, supra.* Instead, the court of appeals simply, and inexplicably, directed dismissal of the race claim."

There was nothing "inexplicable" about the dismissal of the race claim. It was plainly mandated by the refusal of the District Court to find that any statistical imbalance was the result of intentional racial discrimination.

Conclusion

For the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

EDWARD F. BUTLER
MYRON D. COHEN
DAVID R. DAVIES
CONBOY, HEWITT, O'BRIEN & BOARDMAN
20 Exchange Place
New York, New York 10005

LEWIS T. BOOKER
VIRGINIA W. POWELL
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212

Counsel for Respondent
Philip Morris Incorporated